APPALACHIAN MOUNTAIN ADVOCATES

P.O. Box 507
Lewisburg, WV 24901
ph: 304-645-9006
fax: 304-645-9008
email: info@appalmad.org
www.appalmad.org

CS

March 1, 2017

Mr. J.A. Brock
Manager
Fola Coal Company, LLC
c/o Consol Energy, Inc.
1000 Consol Energy Drive
Canonsburg, PA 15317

James H. Booth
Manager
Southeastern Land, LLC
P.O. Box 190
Lovely, KY 41231

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act and SMCRA for Violations at Fola's Surface Mine No. 4A and Bullpen Surface Mine

Dear Mr. Brock and Mr. Booth:

The Sierra Club, Ohio Valley Environmental Coalition, the West Virginia Highlands Conservancy, and the West Virginia Rivers Coalition (collectively "WV Environmental Groups"), in accordance with section 505(b)(1) of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365(b)(1) and 40 C.F.R. Part 135, hereby notify you that Fola Coal Company, LLC ("Fola") has violated and continues to violate "an effluent standard or limitation" under Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), (f)(5) and (f)(6), by failing to comply with the terms and conditions of its WV/NPDES Permit Nos. WV1013815 and WV1017934, and the § 401 certifications issued by the West Virginia Department of Environmental Protection (WVDEP) for Fola's Surface Mine No. 4A and Bullpen Surface Mine in the Leatherwood Creek watershed in West Virginia. If within sixty days of the postmark of this letter Fola does not bring itself into full compliance with the Act, we intend to file a citizen's suit. The WV Environmental Groups will seek civil penalties and declaratory and injunctive relief for Fola's ongoing and continuing violations and an injunction compelling Fola to come into compliance with the Act.

We further notify you, in accordance with section 520 of the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that Fola is in ongoing and continuing violation of certain federal and state regulations promulgated under SMCRA and the West Virginia Surface Coal Mining and Reclamation Act ("WVSCRMA" or the "State Act") and certain permit conditions of its West Virginia Surface Mining Permit Nos. S200502 and S200798 as a result of its discharges of pollutants into Bullpen Fork, Right Fork, and Leatherwood Creek. If, within sixty days, Fola does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and the WVSCMRA, and the Surface Mining Permits identified below, the WV Environmental Groups intend to file a citizens' suit in federal court seeking an injunction compelling Fola to come into compliance with the applicable statutes, regulations, and permits.

Violations of Mining Permits. Fola's mining activities at Surface Mine No. 4A are regulated under West Virginia Surface Mining Permit S200502. That Permit was renewed in 2014 and remains in effect. Fola's mining activities at its Bullpen Surface Mine are regulated under West Virginia Surface Mining Permit S200798. That permit was renewed in 2014 and remains in effect. The WVSCMRA provides that "[a]ny permit issued by the director pursuant to this article to conduct surface mining operations shall require that the surface mining operations meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director." W. Va. Code § 22-3-13(a). In turn, WVDEP's regulations under that statute provide that "[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and this rule." 38 C.S.R. § 2-3.33.c. As shown below in Parts I and II, Fola is violating the standards that "[d]ischarge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards." *Id.* § 2-14.5.b; 30 C.F.R. § 816.42. In addition, Fola is violating the performance standard that requires it to construct systems that will effectively treat its effluent to levels that comply with all applicable water quality standards. 38 C.S.R. § 2-14.5.c.

Violations of Section 401 Certifications. Fola's stream-impacting activities at its Surface Mine No. 4a were authorized on October 24, 2003 under the 2002 Nationwide Permit (NWP) 21 issued by the U.S. Army Corps of Engineers (the Corps) under § 404(e) of the CWA. 33 U.S.C. § 1344(e). Fola's stream-impacting activities at its Bullpen Surface Mine were authorized on February 21, 1999 under the 1996 NWP 21 issued by the Corps. Before the Corps may issue a § 404 permit, it must obtain a certification from the state that the project will not violate that state's water quality standards. 33 U.S.C. § 1341 (CWA § 401). WVDEP's § 401 certifications to the Corps for the 1996 and 2002 NWPs contained standard conditions that must be met at mines with NWP authorizations. As shown below in Parts I and II, Fola is violating Standard Conditions 3, 5 and 13 in WVDEP's two certifications for those NWPs. Condition 3 is that "[s]poil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped into the watercourse or deposited in wetlands or other areas where deposit may adversely affect surface or ground waters of the state." Condition 5 is that "[f]ill is to be clean, nonhazardous, and of such composition that it will not adversely affect the biological, chemical or physical property of the receiving waters." Condition 13 is that "[t]he permittee will comply with water quality standards as contained in the West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 46, Series." Fola's discharges and mining activities are violating these conditions by causing or materially contributing to chemical and biological impairment of the downstream waters, in violation of West Virginia water quality standards set forth at 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

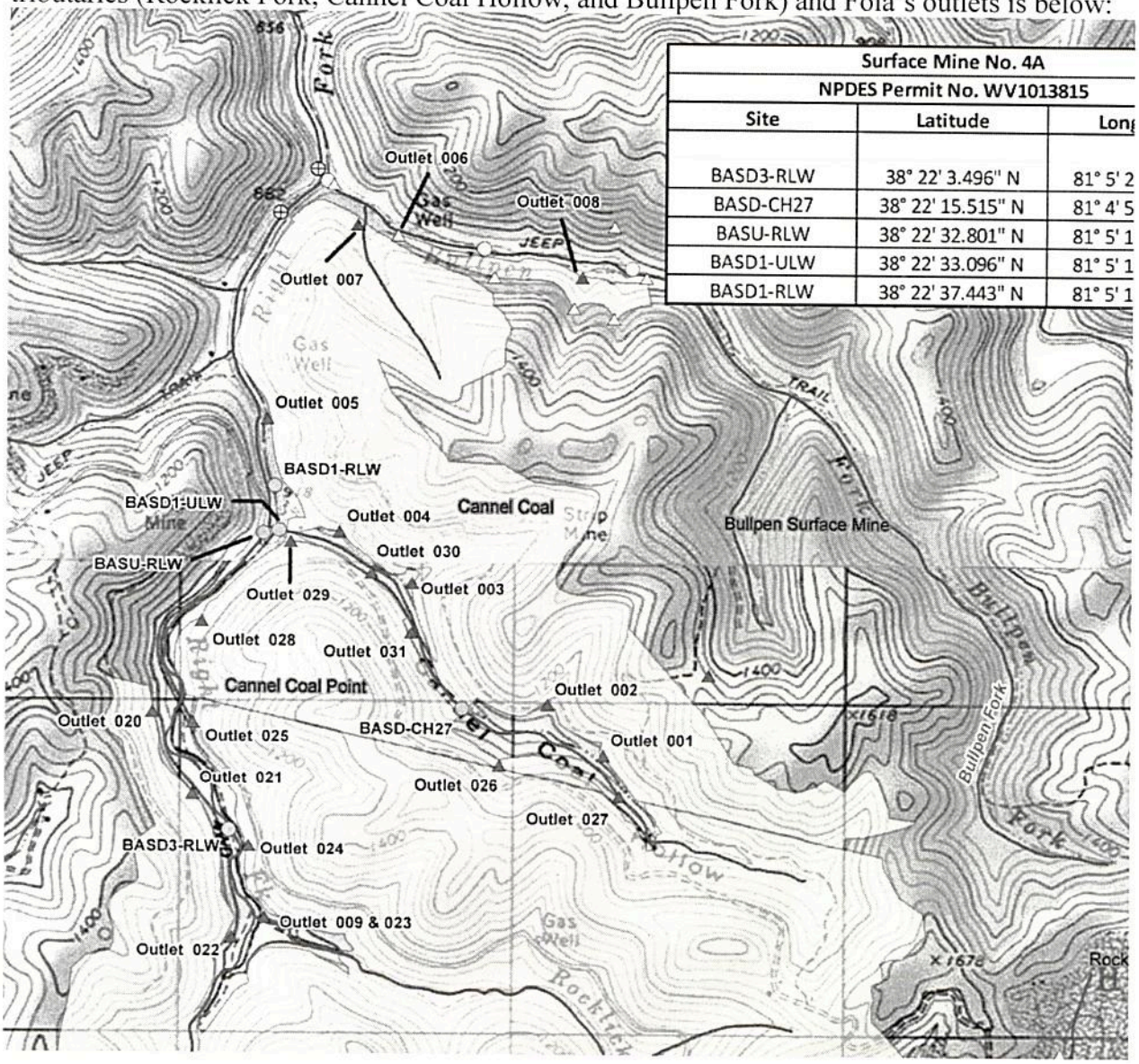
Violations of WV/NPDES Permits. Fola's water discharge activities at Surface Mine No. 4A are regulated under WV/NPDES Permit No. WV1013815. That permit was reissued in 2014 and remains in effect. Part C of that permit incorporates by reference 47 CSR § 30-5.1.f, which provides that: "The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the Department of Environmental Protection, Title 47, Series 2." WVDEP's narrative water quality standards prohibit discharges of "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or that cause "significant adverse impacts to the chemical, physical, hydrologic, or biological components of aquatic ecosystems." 47 C.S.R. §§ 2-3.2.e & 2-3.2.i. Fola is violating this permit condition by discharging ionic pollutants, measured as conductivity, from Outlets 022 and 023 that are causing or materially contributing to biological impairment in Right Fork and Leatherwood Creek, and violations of water quality standards in those streams, as described in Part I below.

Fola's water discharge activities at its Bullpen Surface Mine are regulated under WV/NPDES Permit No. WV1017934. That permit was reissued in 2014 and remains in effect. Part C of that permit incorporates by reference the same requirement in 47 CSR § 30-5.1.f that Fola's discharges not cause or materially contribute to violations of water quality standards. Fola is violating this permit condition by discharging ionic pollutants, measured as conductivity, from Outlets 001 and 009 that are causing or materially contributing to

biological impairment in Bullpen Fork, Right Fork, and Leatherwood Creek, and violations of water quality standards in those streams, as described in Part II below.

I. Violations of Water Quality Standards at Fola's Surface Mine 4A

Permit No. WV1013815 regulates discharges from Outlets 020 through 031 of Surface Mine No. 4A, which discharge into two tributaries of Leatherwood Creek—Right Fork and Cannel Coal Hollow. Leatherwood Creek is a tributary of the Elk River. A map showing the configuration of Right Fork, its tributaries (Rocklick Fork, Cannel Coal Hollow, and Bullpen Fork) and Fola's outlets is below:



As shown by this map, Outlets 020-031 are divided between two streams—Cannel Coal Hollow in the middle of the map and Right Fork on the lower left. Outlets 022 and 023 discharge into the upstream end of Right Fork. Outlets 024, 021, 025, 020, and 028 are located on Right Fork downstream from those two Outlets. Outlet 027 discharges into the upstream end of Cannel Coal Hollow. Outlets 026, 031, 030, and 029 are located on Cannel Coal Hollow downstream from Outlet 027. Outlets numbered less than 020, such as 001, 002, 003, and 004, were terminated in 1994-95 and 2006 and are no longer listed in the 2014 permit. Fola's discharge monitoring reports since January 2015 show that the Outlets other than 022, 023 and 027 had no flow (NF) or were not constructed (NC), as shown in Table A below:

Table A. Average Reported Flow (in gpm)												
Month	Cannel Coal Hollow Outlets					Right Fork Outlets						
	027	026	031	030	029	023	022	024	021	025	020	028
Jan-15	27	NF	NF	NC	NC	290	180	NC	NC	NF	NF	NF
Feb-15	12	NF	NF	NC	NC	195	185	NC	NC	NF	NF	NF
Mar-15	NF	NF	NF	NC	NC	400	190	NC	NC	NF	NF	NF
Apr-15	NF	NF	NF	NC	NC	400	190	NC	NC	NF	NF	NF
May-15	NF	NF	NF	NC	NC	387	187	NC	NC	NF	NF	NF
Jun-15	NF	NF	NF	NC	NC	350	175	NC	NC	NF	NF	NF
Jul-15	NF	NF	NF	NC	NC	295	180	NC	NC	NF	NF	NF
Aug-15	NF	NF	NF	NC	NC	190	175	NC	NC	NF	NF	NF
Sep-15	NF	NF	NF	NC	NC	200	180	NC	NC	NF	NF	NF
Oct-15	NF	NF	NF	NC	NC	200	180	NC	NC	NF	NF	NF
Nov-15	NF	NF	NF	NC	NC	200	175	NC	NC	NF	NF	NF
Dec-15	NF	NF	NC	NC	NC	205	187	NC	NC	NF	NF	NF
Jan-16	NF	NF	NC	NC	NC	200	195	NC	NC	NF	NF	NF
Feb-16	NF	NF	NC	NC	NC	225	260	NC	NC	NF	NF	NF
Mar-16	NF	NF	NC	NC	NC	212	235	NC	NC	NF	NF	NF
Apr-16	NF	NF	NC	NC	NC	215	220	NC	NC	NF	NF	NF
May-16	NF	NF	NC	NC	NC	212	230	NC	NC	NF	NF	NF
Jun-16	NF	NF	NC	NC	NC	200	225	NC	NC	NF	NF	NF
Jul-16	NF	NF	NC	NC	NC	600	390	NC	NC	NF	NF	NF
Aug-16	NF	NF	NC	NC	NC	600	390	NC	NC	NF	NF	NF
Sep-16	NF	NF	NC	NC	NC	550	380	NC	NC	NF	NF	NF

Thus, no outlet currently discharges into Cannel Coal Hollow, and only Outlets 022 and 023 currently discharge into Right Fork. For their claims in this notice letter, WV Environmental Groups are alleging that Fola's discharges from Outlets 022 and 023 are causing or materially contributing to biological impairment and violations of water quality standards in Right Fork and Leatherwood Creek, into which Right Fork flows, in violation of the Part C condition in Permit No. WV1013815.

In *OVEC v. Fola Coal Co., LLC,* 120 F. Supp. 3d 509 (S.D.W.Va. 2015), the court considered a prior challenge to Fola's discharges from Outlets 022, 023 and 027 at Surface Mine No. 4A. The court stated that in order to prove that Fola's discharges caused a violation of the NPDES permit condition quoted above, the plaintiffs had to prove general and specific causation. *Id.* at 515. The court held that plaintiffs proved general causation by showing that "conductivity, as a measure of a consistent mix of ions typical of alkaline mine drainage in the Appalachian region, may cause or materially contribute to biological impairment to aquatic life as measured by the West Virginia Stream Condition Index (WVSCI), thereby constituting a violation of the narrative water quality standards incorporated into Defendant's permits." *Id.* The court also found that "when conductivity reaches 300 µS/cm, it is more likely than not that the streams will suffer impairment" and "the likelihood of impairment continues to increase as conductivity further exceeds that threshold." *Id.* at 517.

As to specific causation, the court summarized the conditions at the Fola 4A site as follows (*id.* at 539-41):

Though there was some pre-Fola mining in the area, Right Fork was unimpaired and in fair shape prior to Defendant's mining operations. In its 2003 CHIA, the WVDEP observed that though some sub-watersheds of Right Fork had elevated manganese and sulfates related to pre-Fola mining, the upper reaches of the watershed maintained low sulfates. Pls.' Ex. 89 at PE0574–75. Indicating high water quality, the report further noted that "all [monitoring] stations provide adequate habitat and contain populations of benthic macroinvertebrates. All the stations have high EPT indices." Pls.' Ex. 89 at PE 0577–78. The majority of pre-Fola water samples showed conductivity levels below the EPA threshold of 300 µS/cm, with some samples deviating upward as high as 1500 µS/cm. Pls.' Ex. 44.

Not surprisingly, the relatively good water quality at Right Fork contributed to unimpaired conditions. In 1997, WVDEP reported an excellent WVSCI score of 84 for Right Fork. Joint Ex. 23 at 68, Tr. 2 at 173, ECF No. 100. In 2000 and 2001, Fola's consultant collected a number of biological surveys from seventeen different sampling locations. Among thirty-three samples from those seventeen sites, only six returned WVSCI scores below 68. Stipulation ¶¶ 22, 29–31, Tr. 2 at 177, ECF No. 100. Since Defendant's mining activities began, Right Fork water quality has notably suffered. Though jumps in conductivity had previously been rare, since 2001, conductivity levels in Right Fork have been almost entirely above 1,500 µS/ cm, now with jumps up to and exceeding 2,500 µS/cm. Stipulation ¶ 33. Similarly, since 2001, sulfate levels are consistently above 600 mg/l; and sometimes as high as 1,200 mg/l. Stipulation ¶ 33.

Consistent with conditions in Right Fork itself, in 2011 and 2012, discharges from Outlets 022, 023, and 027 consistently ranged from 1,500 µS/cm to more than 3,000 µS/cm. Stipulation ¶ 32. In May and September 2014, conductivity from the three discharges ranged from 1820 to 2,958 µS/ cm, with sulfate levels between 920 and 1,800 mg/l. Pls.' Ex. 2–5. The following table provided by Dr. Palmer compiles the data collected at Fola Mine No. 4A discharges, including Broadtree Branch measurements as a comparison point for water chemistry characteristic of alkaline mine drainage [AMD]. See Pls.' Ex. 49.

Table 1. Chemical Composition of Alkaline Mine Drainage

	Location	pH	Conductivity	Alkalinity (as $CaCO_3$)	Hardness (as $CaCO_3$)	Ca	Mg	Na	K	Cl	SO_4
Pre-mining	FOLA-6 (2001)	7.15	461	22	189	34	25	8	3	3	120
	FOLA-7 (2001)	7.35	367	22	396	34	75	2	3	1	110
Post-mining	BASD3RLW (2012)	8.38	1689	124	n/a	265	211	30	16	n/a	1150
	BASD1RLW (2012)	8.17	1538	93	n/a	202	156	31	14	n/a	942
	Outlet 022 (Hansen 2014)	7.9	1820	120		140	120	62	12	32	920
	Outlet 023 (Hansen 2014)	8.1	2720	150		280	260	100	16	ND	180
Reference	Boardtree Branch	8.0	2367	72	1408	241	260	12	21	11	1580

The noted decline in water quality has been accompanied by a decline in WVSCI scores. On May 9, 2014, Dr. Christopher Swan conducted field sampling downstream of Outlets 022, 023, and 027. Based on that sampling

effort, Dr. Swan identified a WVSCI score of 38.21 and a GLIMPSS score of 25.79. Pls.' Ex. 25; Tr. 2 at 184, ECF No. 100. Both numbers clearly indicate impairment and are a far cry from the pre-Fola mining scores. Given these numbers, it is not at all surprising that WVDEP lists Right Fork and Leatherwood Creek as biologically impaired due to mining on its 2012 CWA 303(d) List. Joint Ex. 20; Tr. 2 at 149, ECF No. 100. Furthermore, WVDEP observed in its Elk River Watershed TMDL that ionic toxicity levels in Right Fork are a definite stressor. Joint Ex. 16 at 24; Tr. 2 at 149– 50, ECF No. 100 ("In [Right Fork/Leatherwood Creek] ..., the [stressor identification] process determined ionic toxicity to be a significant stressor. A strong presence of sulfates and other dissolved solids exists in those waters and in all other streams where ionic toxicity has been determined to be a significant biological stressor.").

Despite its finding that water quality had declined after mining began, the court concluded that the plaintiffs had not met their burden of demonstrating that Fola's discharges from Outlets 022, 023, 027 specifically caused the observed biological impairment in Right Fork and Leatherwood Creek. *Id.* at 543-44. The court found that other intervening outlets in Right Fork were a potential source of ionic pollution and that there was no flow data or other evidence in the record to determine whether the observed stream impairment was caused by the three named outlets or by contributions from some or all of the other outlets. *Id.* As shown by Table A above, however, Fola's own reported data since March 2015 show that none of those intervening outlets contribute flow to Right Fork. The only outlets contributing such flow are Outlets 022 and 023. Those outlets therefore specifically cause or contribute to the observed impairment.

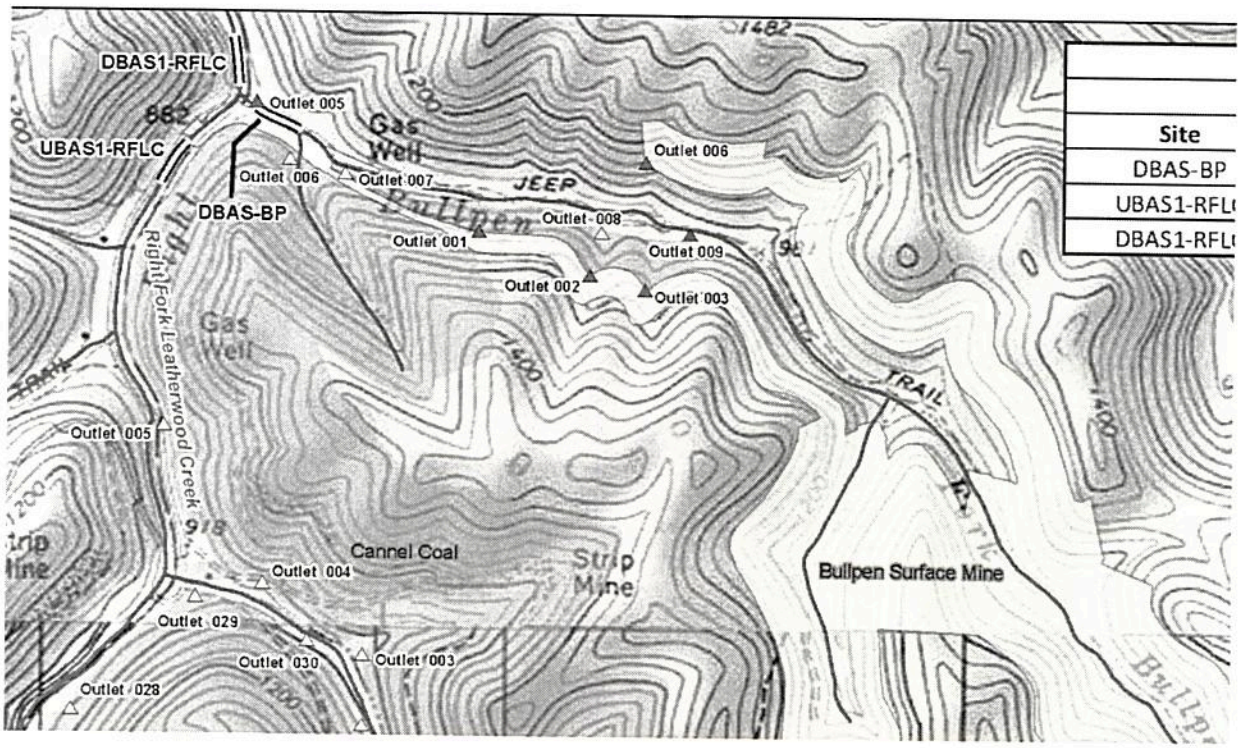
Fola's DMRs show that since January 2015 it has discharged the following average conductivity (in µS/cm) from Outlets 022 and 023, as shown in Table B below:

Table B		
Average Conductivity		
	023	**022**
Jan-15	1985	1450
Feb-15	3510	2075
Mar-15	2715	1790
Apr-15	2925	1820
May-15	2955	2235
Jun-15	3185	2030
Jul-15	2290	1750
Aug-15	2725	1930
Sep-15	2690	1805
Oct-15	2555	1940
Nov-15	2210	1620
Dec-15	3235	1885
Jan-16	2325	1645
Feb-16	2030	1440
Mar-16	3030	1820
Apr-16	2750	1855
May-16	2850	1745
Jun-16	2870	1690
Jul-16	2760	1755
Aug-16	2935	1705
Sep-16	3065	1865

These recent conductivity levels are far above the EPA threshold of 300 µS/cm and in the same range as those noted in the Table 1 in the court's 2015 opinion. 120 F. Supp. 3d at 540 (listing 1820 µS/cm at Outlet 022 and 2390 µS/cm at Outlet 023). Thus, Fola has done nothing since January 2015 to abate the high conductivity in its discharges and is still causing or materially contributing to biological impairment in Right Fork and Leatherwood Creek. In its most recent 2014 annual report on water quality, WVDEP continues to list both of those streams as biologically impaired by mining. 2014 Section 303(d) Report, List Page 15. Thus, this recent data bridges the gap cited in the court's 2015 opinion and shows that Fola is discharging high levels of ionic pollutants, measured as conductivity, from Outlets 022 and 023 that are causing biological impairment in Right Fork.

II. Violations of Water Quality Standards at Bullpen Surface Mine

WV/NPDES Permit No. WV1017934 regulates discharges from Outlets 001 through 009, which are located on or near Bullpen Fork. Bullpen Fork is a tributary of Right Fork, and enters that stream downstream from the stream in Cannel Coal Hollow, which is at the lower left of the map below:



Fola's discharge monitoring reports since January 2015 show that the Outlets 002, 003, 004, and 005 had no flow (NF) or were not constructed (NC), as shown in Table C below:

Table C						
Average Flow (in gpm)						
	001	002	003	004	005	009
Jan-15	15	NC	NC	NC	NF	80
Feb-15	15	NC	NC	NC	NF	40
Mar-15	20	NC	NC	NC	NF	NF
Apr-15	20	NC	NC	NC	NF	80
May-15	20	NC	NC	NC	NF	75
Jun-15	11	NC	NC	NC	NF	70

Jul-15	16	NC	NC	NC	NF	80
Aug-15	14	NC	NC	NC	NF	70
Sep-15	12	NC	NC	NC	NF	121
Oct-15	5	NC	NC	NC	NF	76
Nov-15	17	NC	NC	NC	NF	70
Dec-15	27	NC	NC	NC	NF	150
Jan-16	27	NC	NC	NC	NF	75
Feb-16	42	NC	NC	NC	NF	100
Mar-16	25	NC	NC	NC	NF	150
Apr-16	15	NC	NC	NC	NF	286
May-16	40	NC	NC	NC	NF	425
Jun-16	21	NC	NC	NC	NF	85
Jul-16	17.5	NC	NC	NC	NF	85
Aug-16	14	NC	NC	NC	NF	82
Sep-16	2	NC	NC	NC	NF	69

While Outlets 007 and 008 are shown on the map above, they are not listed on Fola's DMRs or in its permit. Thus, Outlets 001 and 009 are the only reported contributors to flow in Bullpen Fork. The 2005 Cumulative Hydrologic Impact Assessment for Amendment #2 to the permit confirms (p. 4) that "[t]he major drainage control structure for Permit S-2007-98 is Pond #1 (NPDES Outlet 009), an in-stream pond in Bullpen Fork."

The 1999 Cumulative Hydrologic Impact Assessment for S200798 stated that prior to mining, "Bullpen Fork shows very little impact from previous mining." Sulfates were from 18-60 mg/l. On October 27, 1998, a pre-mining benthic survey in Bullpen Fork and Right Fork found that "Bullpen Fork supports a healthy population of pollution 'intolerant' families of benthic macroinvertebrates including mayflies, stoneflies and caddisflies" and was non-impaired. November 20, 1998 Letter from Almes & Associates, Inc. to Vandalia Resources, p. 4 (Permit File S200798, Doc. 00000049). That survey further found that "there are no significant sources of pollution or other environmental stress factors within either of the streams sampled," and "[a]ll of the stations appear to represent 'normal' stream conditions that have not been impacted by previous mining activities and/or other form of impairment." *Id.* at 5.

In May 2014, EnviroScience sampled benthic macroinvertebrates at three sites on Bullpen Fork and Right Fork, as shown by the green lines on the upper left section of the map above. EnviroScience, 2014 Spring WVDEP Narrative Water Quality Standards 3rd Annual Report, at 2. Site DBAS-BP was at the mouth of Bullpen Fork just upstream of its confluence with Right Fork. *Id.* Site UBAS1-RFLC was on Right Fork upstream of its confluence with Bullpen Fork. *Id.* Site DBAS1-RFLC was on Right Fork downstream of its confluence with Bullpen Fork. *Id.* EnviroScience measured the WVSCI scores at these three sites as 48.8, 53.1, and 49.1, respectively, which are all less than a passing score of 68 and demonstrate biological impairment in violation of water quality standard and Fola's permit condition. Report at 13. At the time of that sampling, EnviroScience measured the water quality at these three locations as shown in Table D below:

Table D

Site	pH	Conductivity	Alkalinity	Ca	Mg	Na	K	SO_4
DBAS-BP	6.91	1360	ND	138	101	5.6	8.19	635
UBAS-RFLC	7.83	2390	90.5	249	204	76.5	14.7	1070
DBAS-RFLC	7.79	2250	78.6	233	187	62	13.6	1210

Id. at 19. Since January 2015, Fola has reported the following levels of conductivity (in µS/cm) at Outlets 001 and 009, as shown in Table E below:

Table E		
Average Conductivity		
	001	**009**
Jan-15	849	1805
Feb-15	709	1740
Mar-15	596	1380
Apr-15	651	1590
May-15	733	2068
Jun-15	920	2255
Jul-15	845	1915
Aug-15	865	1980
Sep-15	1010	2024
Oct-15	1090	1790
Nov-15	1080	2360
Dec-15	1170	2145
Jan-16	916	1825
Feb-16	668	1723
Mar-16	721	1760
Apr-16	835	1740
May-16	685	1750
Jun-16	893	1840
Jul-16	766	1860
Aug-16	955	1800
Sep-16	1090	2006

These recent conductivity levels are far above the EPA threshold of 300 µS/cm for biological impairment. Fola's discharges of high levels of ionic pollutants, measured as conductivity, are causing or materially contributing to biological impairment in Bullpen Fork, Right Fork and Leatherwood Creek.

In its most recent DMRs, Fola has reported the levels of instream conductivity listed in Table F below. From top to bottom, the table lists values starting at the upper reaches of Right Fork and then moves downstream to Leatherwood Creek, into which Right Fork flows. The table shows that throughout this entire reach, the conductivity is consistently over 1500 µS/cm, far in excess of the 300 µS/cm threshold for biological impairment:

Table F—Instream Conductivity Measurements					
Site	Location	Months			
		6/16	7/16	8/16	9/16
DCCH (P-9)	Near mouth of Cannel Coal Hollow	2160	2475	2300	2335
DRFLC (P-10)	On Right Fork below Cannel Coal Hollow	2150	2475	2175	2565
DSBF	Near the mouth of Bullpen Fork	1810	n/a	1580	2405
DRFLC (P-11)	Near the mouth of Right Fork and below Bullpen Fork	2150	2105	2145	2285
DRLC (P-12)	On Leatherwood Creek below its confluence with Right Fork	2150	2045	2175	2275

Thus, Fola's discharges of ionic pollutants, measured as conductivity, are causing or materially contributing to violations of water quality standards in Right Fork, Bullpen Fork and Leatherwood Creek.

Legal Claims

A. CWA

The CWA authorizes citizens to sue "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). An "effluent standard or limitation under this chapter" is defined to include "a certification under section 1341 of this title" and "a permit or condition thereof." *Id.*, § 1365(f)(5), (f)(6). A person who violates a condition in a § 401 certification or a condition of an NPDES permit is therefore in violation of the CWA and subject to a citizen enforcement action under the CWA. Based on the available evidence of continuing high conductivity levels, and the absence of any corrective measures taken by Fola since the court's decision in August 2015, we believe that Fola's violations of the narrative water quality standards in 47 C.S.R. § 2-3.2.e & i. are violations of its permits and certifications, have been ongoing since that decision, and can be enforced by WV Environmental Groups in a new lawsuit. If Fola does not cease those violations within 60 days, we intend to bring a citizen suit against Fola under Section 505(a)(1) of the CWA seeking civil penalties and injunctive relief.

B. SMCRA

Section 520(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). West Virginia has a federally-approved mining program under SMCRA which is administered by the WVDEP pursuant to the WVSCMRA. Violations of a federally-approved state program are enforceable in federal court under SMCRA's citizen suit provision. *Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231, 237 (4th Cir. 1997). We believe that Fola is in continuous and ongoing violation of the state and federal performance standards that prohibit mining operations from causing violations of water quality standards. 38 C.S.R. § 2-14.5.b; 30 C.F.R. § 816.42. In addition, Fola's mining operations have resulted in impermissible and ongoing material damage to the hydrologic balance, in violation of 38 C.S.R. § 2-14.5. Fola is also in continuing violation of its legal duty to treat its effluent to ensure that it does not violate water quality standards. 38 C.S.R. § 2-14.5.c; 30 C.F.R. § 816.41(d)(1). These standards require Fola to construct systems that will effectively treat its effluent to levels that comply with all applicable water quality standards. Finally, Fola's violations of the performance standards that prohibit violations of water quality standards and material damage and that require adequate treatment to avoid such violations are violations of its mining permits S200502 and S200798. By operation of 38 C.S.R. § 2-33.c, those permits incorporate the performance standards discussed in this letter as terms of the permits themselves. Consequently, Fola is violating its SMCRA permits.

CONCLUSION

If Fola has taken any steps to eradicate the underlying cause of the violations described above, or if Fola believes that anything in this letter is inaccurate, please let us know. If Fola does not advise us of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are likely to continue. Additionally, we would be happy to meet with Fola or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,

J. Michael Becher
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901
(304) 382-4798
mbecher@appalmad.org

James M. Hecker
Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
jhecker@publicjustice.net

Counsel for:

Ohio Valley Environmental Coalition
P.O. Box 6753
Huntington, WV 25773
(304) 522-0246

The Sierra Club
85 Second Street, 2d Floor
San Francisco, CA 94105-3441
(415) 977-5680

West Virginia Highlands Conservancy
P.O. Box 306
Charleston, WV 25321
(304) 924-5802

West Virginia Rivers Coalition
3501 MacCorkle Ave SE Ste. 129
Charleston WV 25304
(304) 637-7201

cc (via certified mail):

Secretary Austin Caperton
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

Regional Administrator
U.S. Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Administrator Scott Pruitt
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Registered Agent
Fola Coal Company, LLC
CT Corporation System
5400 D Big Tyler Road
Charleston, WV 25313

Registered Agent
Southeastern Land, LLC
Matrix Energy, LLC
2408 Sir Barton Way
Suite 325
Lexington, Ky, 40509-8305

Administrator
Office of Surface Mining Reclamation
and Enforcement
1951 Constitution Ave N.W.
Washington, D.C. 20240

Secretary Ryan Zinke
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Thomas Shope
OSMRE Regional Director
3 Parkway Center
Pittsburgh, PA 15220